BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996	)	CC Docket No. 96-128
	)	
	)	

REPLY COMMENTS OF BELLSOUTH TELECOMMUNICATIONS, INC., SBC COMMUNICATIONS INC., AND THE VERIZON TELEPHONE COMPANIES ON ILLINOIS PUBLIC TELECOMMUNICATIONS ASSOCIATION'S PETITION FOR A DECLARATORY RULING

INTRODUCTION AND SUMMARY

The comments filed in response to the petition for declaratory ruling of the Illinois Public Telecommunications Association ("IPTA") make clear that the Commission should deny the relief that IPTA seeks. As the Illinois Commerce Commission ("ICC") correctly points out, the Commission, in its *Payphone Orders*, specifically ruled that the basic payphone line tariffs that BOCs were required to file "were *intra*state tariffs." ICC Comments at 7. It follows that the state procedures and remedies applicable to such tariffs govern enforcement of federal rights.

I. The Commission has made clear in its prior orders that ensuring that basic payphone line rates accord with federal standards is a state commission responsibility. There is no basis for the Commission to interfere with a state commissions' procedures – to the contrary, in comparable circumstances the Commission has consistently deferred to state commissions application of federal law. Particularly in light of the ICC's clear commitment to enforce the requirements of the *Payphone Orders*, there is no basis for the Commission to question its choice of remedies.

II. The various comments filed in support of IPTA's petition emphasize this point. Almost without exception, the comments essentially ignore the merits of IPTA's request for relief,

instead addressing other state commission decisions in other proceedings. Given the variety of facts and circumstances present in individual states – and the absence of any record on which to evaluate such facts and circumstances – the Commission cannot establish any rule to govern the appropriate outcome in particular states. Indeed, in cases where the rights of independent payphone providers ("IPPs") have been adjudicated – as in Ohio, the District of Columbia, and New York, for example – principles of *res judicata* bar relitigation of these issues in any forum.

III. On the legal merits, the commenters add nothing to the failed arguments of IPTA. Any requirement that non-BOC Verizon Illinois set its payphone line rates in accordance with the New Services Test was beyond the Commission's statutory authority. And the filed tariff doctrine plainly bars retroactive adjustments to carriers' lawful rates. There is nothing in the *Payphone Orders* that purports to preempt filed rate principles.

IV. The claim that any carrier made a commitment to provide refunds in the circumstances present in Illinois is incorrect. The waiver order and the letter that sought the waiver make clear that the carriers' commitment was a limited one, designed to address confusion over the scope of prior Commission orders. Carriers learned only in early April 1997 that they would be required to have New-Services-Test-compliant basic payphone line rates; to ensure that they would have adequate time to make any required filings, carriers asked for a short extension of time and agreed to eliminate any prejudice to IPPs *from that short extension*. Far from supporting IPPs claims, the terms of the waiver make clear that no automatic refunds are required under the Commission rules.

V. The question of LEC-affiliated PSPs' eligibility for per-call compensation is not properly at issue here. IPPs do not pay per-call compensation, and the Commission has already

designated the appropriate remedy for any payor that wishes to challenge PSPs' eligibility – initiation of a proceeding at the Commission.

I. THE COMMISSION HAS GIVEN STATES RESPONSIBILITY FOR ENFORCING FEDERAL STANDARDS APPLICABLE TO PAYPHONE LINE RATES

The Commission need not issue any ruling on the merits of IPTA's claims for a basic reason: the Commission's prior orders make clear that state tariffs would continue to govern basic payphone line rates. *See* Comments of BellSouth Telecommunications, Inc., SBC Communications Inc., and Verizon telephone companies ("LEC Comments") at 12-14. As a necessary consequence, state procedures and remedies govern the enforcement of any federal rights. And, where a state commission is acting to carry out its proper role, it would be inconsistent with Commission practice and principles of comity to interfere.

This case thus resembles others in which the Commission has declined to consider a request for relief where a state commission has already provided an adequate forum. For example, in *AT&T Corp. v. Bell Atlantic Corp.*, 15 FCC Rcd 17066 (2000), *aff'd sub nom. MCI WorldCom, Inc. v. FCC*, 274 F.3d 542 (D.C. Cir. 2001), AT&T and MCI filed formal complaints challenging Bell Atlantic's compliance with certain pricing requirements contained in the Bell Atlantic/NYNEX Merger Order. Bell Atlantic moved to dismiss the complaints arguing, among other things, that the Commission should defer to state commission rate-making proceedings that had applied the same federal standards that AT&T and MCI argued should govern. *See id.* at 17068, ¶ 6. AT&T and MCI opposed dismissal, arguing that states had reached "incorrect and conflicting results." *Id.* at 17071, ¶ 11. The Commission nevertheless dismissed the proceeding "for reasons of comity," *id.* at 17067, ¶ 1, noting that if the complainants disagreed with the determination of particular state commissions, they could seek relief in court, *see id.* at 17071, ¶ 12. Likewise, the Commission denied Global NAPs' petition for preemption of the jurisdiction

of the New Jersey Board of Public Utilities in a case where the Board acted on the subject of the petition after GNAPs filed at the FCC.[1] And, in the 271 context, the Commission has consistently deferred to state commission application of federal standards. *See, e.g.*, Order on Reconsideration, *Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act To Provide In-Region InterLATA Service in the State of New York*, 16 FCC Rcd 11457, 11460, ¶ 9 (2001) (noting that Commission "defer[s] to a state commission's findings of fact regarding pricing issues" and that "[t]his standard of review was upheld on appeal"); *see also* Memorandum Opinion and Order, *Petition of WorldCom, Inc. for Preemption*, 17 FCC Rcd 27039, 27048-49, ¶ 18 (2002) ("[W]e agree that, as a practical matter and a matter of comity, we should defer to the Virginia Commission on performance issues.").

Here, the Illinois Commission has made clear that it "undertook precisely [the] investigation" that the Commission had required state commissions to undertake in the *Payphone Orders*. ICC Comments at 5. Given that state commission's commitment to carry out its responsibility to enforce federal standards, allowing IPTA to seek review of its determination before the Commission would be inconsistent with the principles of comity that this Commission has respected in prior cases.

II. THE OUTCOME OF PARTICULAR STATE PROCEEDINGS IS NOT AN APPROPRIATE SUBJECT FOR A DECLARATORY RULING

For the most part, the comments filed in support of IPTA's petition simply complain about state commission decisions or procedures in individual states. Such complaints are fundamentally inapposite to the IPTA petition – which specifically asks for relief with regard to Illinois only. Indeed, they serve only to underline that a state-specific petition is not the

[1] *See* Memorandum Opinion and Order, *Global NAPs, Inc. Petition for Preemption of Jurisdiction of the New Jersey Board of Public Utilities Regarding Interconnection Dispute with Bell Atlantic-New Jersey, Inc.*, 14 FCC Rcd 12530 (1999).

appropriate subject for a declaratory ruling. As the ICC correctly argues, the relief granted in particular states "are subject to state laws governing the filing, implementation, review and application of tariffs." ICC Comments at 14-15. And it is also subject to the procedural choices taken by individual IPPs. *See* LEC Comments at 9-10.

The Commission should be particularly reluctant to address any of the issues presented in the various comments because there is no record upon which to evaluate the situation in any particular state. For example, the Payphone Association of Ohio criticizes SBC and the Ohio Commission for failing to provide its members refunds for payphone line charges paid under prior rates. But the Payphone Association of Ohio mischaracterizes the relevant state proceedings, failing to note that the Ohio Commission – in September 1997 – issued an order in which it approved SBC's revised payphone tariffs as "consistent with the requirements of the 1996 Act [and] the FCC's decisions in CC Docket No. 96-128."[2] The Ohio Commission made clear that it could conduct "subsequent investigation[s] or proceeding[s]" with regard to the reasonableness of particular rates, but in light of the explicit approval of the existing tariffs, any subsequent adjustment could only be prospective. In later proceedings in the same case, the Ohio Commission specifically adjudicated and rejected the Payphone Association of Ohio's arguments seeking refunds, holding that refunds would be tantamount to unlawful retroactive ratemaking.[3]

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[2] Entry, *In the Matter of the Commission's Investigation into the Implementation of Section 276 of the Telecommunications Act of 1996 Regarding Pay Telephone Services*, Case No. 96-1310-TP-COI, at 3 (Pub. Utils. Comm'n Ohio Sept. 25, 1997), *available at* www.puco.ohio.gov/emplibrary/files/docketing/orders/Documents/970925/96-1310.pdf.

[3] Entry rel. Apr. 27, 2000; Entry on Rehearing rel. June 22, 2000; Entry rel. Nov. 26, 2002; Entry on Rehearing rel. Jan. 16, 2003; Entry rel. Sept. 23, 2003; and Entry on Rehearing rel. Nov. 13, 2003, *In the Matter of the Commission's Investigation into the Implementation of Section 276 of the Telecommunications Act of 1996 Regarding Pay Telephone Services*, Case No. 96-1310-TP-COI (Pub. Utils. Comm'n Ohio), *available at*

To cite another example, the Atlantic Payphone Association claims that it should be entitled to refunds in the District of Columbia even though the "Public Service Commission of the District of Columbia . . . found that Verizon's payphone line rates complied with the new services test." Atlantic Payphone Association, Inc. Comments at 4 n.6. This conclusion was never challenged in court: it is final and binding.

And while the Independent Payphone Association of New York ("IPANY") argues that the Appellate Division of the New York Courts erred, IPANY is barred by *res judicata* from relitigating the question of entitlement to refunds from Verizon. That issue has been litigated before the New York PSC and in the New York courts, which squarely ruled that IPANY's members have no entitlement to refunds either under New York law or under the terms of the Bureau's Waiver Order. *See Independent Payphone Ass'n of New York v. Public Serv. Comm'n*, 774 N.Y.S.2d 197, 198 (App. Div. 3d Dep't 2004). IPANY's has applied to New York's highest court for discretionary review (that application is pending), but it may not collaterally attack the appellate court's judgment before the Commission or anywhere else.

Each of these individual state cases may involve multiple proceedings, extensive records, and a wide variety of legal and procedural issues. The Commission should therefore exercise its discretion and deny the IPTA petition as an inappropriate subject for declaratory relief.

III. THE FILED COMMENTS PROVIDE NO BASIS FOR QUESTIONING THE ICC'S DETERMINATION

None of the filed comments provides any new argument to support IPTA's claim that the ICC's determination was incorrect. We have already explained that any federal requirement that Verizon Illinois set its basic payphone line rates in accordance with the New Services Test was beyond the Commission's statutory authority and therefore unenforceable. *See* LEC Comments

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http://dis.puc.state.oh.us/dis.nsf/0/f1be01df255c8a6c85256994005e7a97?OpenDocument&TableRow=3.0#3.

at 10-12. Likewise, the ICC's conclusion that applicable filed rate principles barred IPTA's claim for refunds is unassailable. *See id.* at 15-17.

The broad claim that the Commission preempted filed rate principles in its *Payphone Orders* is wrong. As we noted in our opening comments, by choosing to rely on state tariffs and state procedures for enforcement of federal pricing standards, the Commission made clear that state procedural rules and remedies would govern. *See id.* at 12-15. Nothing in the *Payphone Orders* states or implies that the Commission intended to require automatic refunds in the event that a state eventually determined that a BOC's payphone line rates should be reduced in light of those federal standards. The IPPs cite nothing in support of their assertions to the contrary.

IV. THE IPPS MISREAD THE BUREAU WAIVER ORDER

The IPPs attempt to rely on the *Second Bureau Waiver Order*[4] and a letter from counsel to the RBOC Payphone Coalition to support the claim that LECs agreed to provide refunds in any case where a state commission eventually determined that payphone line rates should be reduced. That claim misreads the *Second Bureau Waiver Order* and the letter. In fact, the language of the letter and the surrounding circumstances make absolutely clear that the commitment referred to in the Bureau's order is of limited scope and cannot be read to mean that the LECs agreed to provide refunds whenever state commissions determine that payphone line rates should be lowered.

The genesis of the *Second Bureau Waiver Order* is this: controversy arose after the release of the *Payphone Orders* concerning the scope of federal requirements governing intrastate tariffs for services to be provided to payphone providers. In the *First Bureau Waiver*

[4] Order, *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, 12 FCC Rcd 21370 (CCB 1997) ("*Second Bureau Waiver Order*").

Order,[5] the Common Carrier Bureau granted LECs a 45-day extension to file federal tariffs for unbundled payphone features and functions as required by the *Payphone Orders*. In that order, the Bureau also made clear, contrary to LECs' previous understanding, that basic payphone line rates tariffed in the intrastate jurisdiction would have to comply with the New Services Test. *See* 12 FCC Rcd at 21011-12, ¶¶ 30-32. In response, the RBOC Coalition sought a second waiver to allow its members a brief additional period to determine whether any additional state filings would be necessary to comply with this requirement. The Coalition said that at the end of the brief additional period, its members would "either be prepared to certify that the existing tariffs satisfy the costing standards of the 'new services' test or to file new or revised tariffs." April 11, 1997 Letter from Michael K. Kellogg to Mary Beth Richards at 1 (American Public Communications Council ("APCC") Comments Attach. 2). The Coalition then stated that "*where new or revised tariffs are required* and the new tariff rates are lower than the existing ones, we will undertake (consistent with state requirements) to reimburse or provide credit back to April 15, 1997, to those purchasing the services under the existing tariffs." *Id.* (emphasis added).

Thus the Coalition's commitment was expressly limited to the sole circumstance where a member filed new or revised tariffs and did *not* apply at all in situations where a member certified that existing tariffs were compliant. The RBOC Coalition's only commitment was to reimburse the difference between newly filed tariffs (*i.e.*, tariffs filed pursuant to the waiver order) and the tariff in effect on April 15, 1997. The *Second Bureau Waiver Order* simply reiterates the RBOC Coalition's voluntary commitment, limited in both relevant respects. *See* 12

[5] Memorandum Opinion and Order, *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, 12 FCC Rcd 20997 (CCB 1997) ("*First Bureau Waiver Order*").

FCC Rcd at 21376, 21379-80, ¶ 20 (requiring reimbursement only for BOCs that "seek[] to rely on the waiver" and only "in situations where the newly tariffed rates are lower than the existing tariffed rates").

Not only is that reading the only one that comports with the terms of the letter, it is also the only reading that makes sense in light of circumstances. The Commission had already made clear that, in states where BOCs already had payphone line tariffs on file that complied with the requirements of section 276, no further filings would be required. If, upon further review, one of the Coalition members determined that its existing rates were consistent with federal requirements, it would not have benefited in any way from the waiver and would have had no reason to forfeit any rights. The only BOCs that would have to rely on the waiver to demonstrate compliance with the requirements of the *Payphone Orders* would be those filing new or revised tariffs. They accordingly agreed to ensure that IPPs would be placed in the same position that they would have been in had the tariffs been filed by April 15, 1997, rather than by May 19, 1997. But that is all that the Coalition agreed to do.

As we have already explained, that commitment is not implicated at all in this case because SBC Illinois did not file any new or revised tariffs. *See* LEC Comments at 14 n.7 (Verizon Illinois was under no valid legal obligation to comply with the new services test, but, in any event, it provided reimbursement or credits to the extent that it had agreed to do so.). There is no legitimate argument that any Coalition member failed to comply with the letter or the spirit of the Coalition's commitment.[6]

[6] Atlantic Payphone Association attempts to rely on a snippet of transcript from a proceeding in Maryland to claim that Verizon had acknowledged "its obligation to pay refunds when its payphone line rates do not comply with the new services test." Atlantic Payphone Association, Inc. Comments at 3. In fact, in that hearing, Verizon's counsel specifically disagreed that Verizon had agreed to provide refunds. *See id.*, App. A. at 18 ("There is no agreement as

Indeed, as noted in our opening comments, far from supporting IPTA's petition, the *Second Bureau Waiver Order* is actually *inconsistent* with IPTA's claims here. If refunds were required in all cases where payphone line rates are eventually reduced to comply with the New Service Test, there would have been no reason for the Bureau to rely on the RBOC Coalition's voluntary commitment to provide such reimbursement. The terms of the Bureau's order thus make clear that ordinary state law procedural and remedial rules would continue to apply to intrastate payphone line tariffs.

V. THE COMMISSION SHOULD DENY IPTA'S REQUEST FOR A DECLARATION THAT SBC ILLINOIS AND VERIZON ILLINOIS WERE INELIGIBLE FOR PAYPHONE COMPENSATION

The Comments filed in response to IPTA's petition provide no basis for the Commission to address any issue related to eligibility for per-call compensation. None of the IPPs has standing to raise this issue. *Id.* at 17-18. To the contrary, the Commission has already made clear that if a payor of compensation wishes to challenge a particular PSP's eligibility for compensation, it must to so in an appropriate proceeding before the Commission. *See id.*

In all events, for reasons that we have already explained, the claim is without merit. Verizon Illinois was not subject to any valid requirement to set its payphone line rates in compliance with the New Services Test: the Commission had *no* statutory authority to adopt such a requirement, whether under section 276(b)(1)(A) or section 276(b)(1)(C), as the Commission has held and as the D.C. Circuit has affirmed. And SBC Illinois took every step it was required to take to comply with the Commission's *Payphone Orders*, and it has accordingly been eligible for compensation since April 15, 1997.

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such."). To the extent counsel addressed what remedies would be appropriate in that particular Maryland proceeding, the issue is irrelevant to this proceeding and Atlantic Payphone Association raises no complaint about Verizon's rates or actions in that state in any event. *See id.* at 2.

CONCLUSION

The Commission should deny the petition.

Respectfully submitted,

/s/

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